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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted] **Public Copy**

File: WAC-99-170-53371 Office: California Service Center Date: JUN 6 2001

IN RE: Petitioner: [redacted]

Petition: Immigrant Petition by Alien Entrepreneur Pursuant to § 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(5)

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks classification as an alien entrepreneur pursuant to § 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(5).

The director determined that the petitioner had failed to demonstrate that he had made a qualifying investment of lawfully obtained funds or that he would create the necessary employment.

On appeal, counsel argues that the petitioner invested the necessary funds, all of which were lawfully obtained and placed at risk, and that the petitioner has already created seven jobs and will create an additional three.

Section 203(b)(5)(A) of the Act provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) which the alien has established,
>
> (ii) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
>
> (iii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

The record indicates that the petition is based on an investment in a business, [redacted] (the Corporation) not located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is $1,000,000.

INVESTMENT OF CAPITAL

8 C.F.R. 204.6(e) states, in pertinent part, that:

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable

and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. ...

Invest means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

8 C.F.R. 204.6(j) states, in pertinent part, that:

(2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

(i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;

(ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices; sales receipts; and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;
(iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

(iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

In support of the petition, the petitioner submitted the following:

1. A wire transfer receipt documenting the transfer of $1,000,000 to the petitioner's account number [redacted];

2. A money transfer order requesting the transfer of $1,000,630.78 from account number [redacted] to Citibank account number [redacted], also belonging to the petitioner;

3. Statements from account number [redacted] reflecting withdrawals of $210,000 on March 26, 1999 and $790,000 on April 6, 1999;

4. A statement from General Bank reflecting a corporate account opened on March 26, 1999 with $200,000;

5. A statement from General Bank reflecting a corporate account opened on March 26, 1999 with $10,000;

6. A letter from Citibank reflecting the following corporate accounts opened in April 1999: a checking account with $10,000, a money market account with $480,000, and three certificates of deposit totaling $300,000;

7. A corporate notice of transaction regarding an offering of $1,000,000 dated May 10, 1999; and

8. A stock ledger and stock certificate reflecting the petitioner's purchase of 10,000 shares for $1,000,000.

On July 7, 1999, the director requested additional documentation of the petitioner's investment. In response, counsel referred the director to the documents already submitted. Counsel noted that the petitioner's investment was all cash, and did not involve a loan or transfer of property.

The director concluded that the funds transferred to the money market account and certificates of deposit, totaling $780,000, had not been placed at risk. The director also asserted that the record did not indicate that the petitioner had transferred the funds to the Corporation in exchange for shares of stock.

On appeal, counsel argues that all the funds transferred to the Corporation are at risk because it is a cash investment, not involving a loan, and because the failure of the business will result in the loss of the investment. Further, counsel notes that the petitioner used the money market and certificate of deposit funds to purchase property prior to the director's decision denying the petition. While counsel concedes the petitioner must be eligible at the time of filing, counsel argues the record establishes that the petitioner was actively in the process of investing at that

time. The petitioner submits deeds, closing documents, certified checks issued by the Corporation, invoices for repairs, and resale advertisements all relating to two pieces of property, both residential houses. Finally, the petitioner submits bank statements reflecting the closure of the three certificates of deposit between December 1999 and February 2000, three deposits of over $100,000 into the business checking account during that same period, and a lower balance of $209,099.55 for the money market account as of April 20, 2000.

As evidence of his purchase of stock, the petitioner did submit a Notice of Transaction regarding the offering of $1,000,000 by the Corporation, the stock ledger, and a stock certificate. While such documents should not be ignored, as the petitioner is the sole shareholder and director, the documents are all issued by him and are somewhat self-serving. The record does not contain tax returns certified as filed by the Internal Revenue Service or audited balance sheets confirming those documents.

Regardless, the petitioner has still not established that the funds were placed at risk and made available for employment creation. While the application for an employer identification number indicates the Corporation is an import/export company, the Form I-526, business plan, and statement by a domestic stock corporation all indicate the Corporation is an interior design company. The projected jobs include designers, warehouse staff, sales persons, and accountants. The two pieces of property purchased are residential homes. The record contains invoices indicating that the Corporation retained the services of landscapers and construction workers to fix up the property for resale. There is no evidence that the property was purchased as part of the interior design business or that the renovations to the houses included interior design and involved the employees of the Corporation. Rather, the property appears to have been purchased as a passive, non employment-generating real estate investment. As such, the funds used to purchase and renovate the property were not made available for employment creation.

The regulations provide that a petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. A mere deposit into a corporate money-market account, such that the petitioner himself still exercises sole control over the funds, hardly qualifies as an active, at-risk investment. Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations, July 31, 1998) at 5. Even if a petitioner transfers the requisite amount of money, he must establish that he placed his own capital at risk. Spencer Enterprises, Inc. v. United States, CIV-F-99-6117, 27 (E.D. Calif. 2001)(citing Matter of Ho).

Based on the record before her, the director properly concluded that the funds in the money market account and certificates of deposit, $780,000 of the petitioner's $1,000,000 "investment" were not at risk. The fact that the petitioner eventually used those funds for a passive, non employment-generating real estate investment does not change the conclusion that the funds were not at risk regarding the interior design business and were never made available for employment-generating activities. Counsel's assertion that, should the business fail, the

petitioner's funds would be lost, is not supported by the record. The real estate investments appear to be generating their own return separate from the success of the employment-generating portion of the business.[1] For all the reasons discussed above, the petitioner has not demonstrated a qualifying investment.

SOURCE OF FUNDS

8 C.F.R. 204.6(j) states, in pertinent part, that:

> (3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:
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> (i) Foreign business registration records;
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> (ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;
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> (iii) Evidence identifying any other source(s) of capital; or
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> (iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. Matter of Ho, supra, at 6; Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations July 31, 1998) at 26. Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. Id. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft

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[1] It is acknowledged that the creditors of the corporation, should it fail, would be able to reach all of the assets of the corporation, including the real estate or proceeds of the sale of the property, if still in the corporate accounts. The interior design portion of the business, however, is grossly overcapitalized, resulting in little, if any, risk to the real estate investment funds should the employment-generating business fail.

of California, 14 I&N Dec. 190 (Reg. Comm. 1972). These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. Spencer Enterprises, Inc. v. United States, supra.

In support of the petition, the petitioner submitted a business registration for [redacted], registered in 1989, reflecting the petitioner as the legal representative of that company; a bank statement from Hua Nan Commercial Bank reflecting a balance of NTD 3,181,781 ($95,836) as of March 10, 1999; a statement from American Express Bank reflecting a balance of NTD 2,744,255 (approximately $82,658) as of April 8, 1998; Citibank statements reflecting total balances of NTD 1,682,679.92 ($50,775) as of March 8, 1999; statements from Hwa Tai Commercial Bank reflecting total balances of NTD 6,982,398 ($210,694) as of March 9, 1999; and uncertified translations of property registration certificates for property allegedly owned by the petitioner and his wife.

In response to the director's request for additional documentation, the petitioner submitted his personal tax returns for 1994 through 1998; a business license for [redacted], Ltd., established 1995, reflecting the petitioner as the legal representative of that company; and a business tax report for that company.

The director concluded the petitioner had not established the lawful source of his funds as he had not provided the currency exchange or the fair market value of the property owned by himself and his wife.

On appeal, counsel notes that the tax returns reflect that the petitioner earned $937,039 between 1994 and 1998, that the petitioner and his wife sold three pieces of property in 1995 and 1996 totaling $530,120, and that the petitioner maintained savings accounts with a total balance of $412,438 prior to his investment. The petitioner submits real estate contracts for the property sold.

A review of the tax returns reveal that they include the income from the sale of property. Thus, the petitioner cannot include the income from those sales in addition to the income reflected on his tax returns. The tax business registrations and tax returns, however, reflect that the petitioner has managed two businesses, one since 1989, and has derived substantial income from those businesses. Such income could account for the accumulation of $1,000,000.

Even if the record reflects that the petitioner could have accumulated $1,000,000, it is not clear that he did accumulate that sum or that the funds transferred to the United States were the petitioner's funds. The petitioner began transferring $1,000,000 to his United States bank account on March 1, 1999. The record does not reveal how much money was in his various Taiwan bank accounts prior to that date. The wire transfer applications do not reveal a bank account number or other source of the funds transferred to the petitioner's United States accounts. The petitioner has not demonstrated that he had an account at China Trust Bank, the

bank from which the funds were wired. Significantly, the Corporation's 1999 tax return, Form 5472, reflects the petitioner's foreign corporation, [redacted], Ltd., as an indirect shareholder and related party, suggesting the possibility that at least some of the funds might have come from that corporation. A corporation is a separate and distinct legal entity from its owners or stockholders. See Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); Matter of Aphrodite Investments Limited, 17 I&N Dec. 530 (Comm. 1980); Matter of M-, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). Therefore, any funds contributed by [redacted] cannot be considered the petitioner's personal investment.

In light of the above, the path of the petitioner's funds is not completely clear.

EMPLOYMENT CREATION

8 C.F.R. 204.6(j)(4)(i) states:

> To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:
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> (A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or
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> (B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

8 C.F.R. 204.6(e) states, in pertinent part:

> *Full-time employment* means employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week.
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> *Qualifying employee* means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United

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[2] While the translations of Chinese business documents refer to "[redacted]," it appears that the Chinese equivalent of "[redacted]" and "[redacted]" are the same.

> States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

Finally, 8 C.F.R. 204.6(g)(2) relates to multiple investors and states, in pertinent part:

> The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. No allocation need be made among persons not seeking classification under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. The Service shall recognize any reasonable agreement made among the alien entrepreneurs in regard to the identification and allocation of such qualifying positions.

Full-time employment means continuous, permanent employment. See Spencer Enterprises, Inc. v. United States, supra, at 19 (finding this construction not to be an abuse of discretion).

Pursuant to 8 C.F.R. 204.6(j)(4)(i)(B), if the employment-creation requirement has not been satisfied prior to filing the petition, the petitioner must submit a "comprehensive business plan" which demonstrates that "due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired." To be considered comprehensive, a business plan must be sufficiently detailed to permit the Service to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. Matter of Ho, supra. Elaborating on the contents of an acceptable business plan, Matter of Ho states the following:

> The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a

> timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

In support of the petition, the petitioner submitted two Forms I-9 and a business plan projecting the need for another eight employees. In response to the director's request for additional information, the petitioner submitted three new Forms I-9 and an Employer's Quarterly Return for the second quarter of 1999 reflecting three employees by March 1999.

The director concluded the petitioner had not created ten new jobs and the business plan was insufficient. On appeal, the petitioner submits eight Forms I-9 and Employer's Quarterly Returns for 1999 and the first quarter of 2000. These returns reflect that employment at the Corporation increased to eight employees in September 1999, was back to seven employees by November 1999 and remained at six employees through the first quarter of 2000.

While the record reflects that the Corporation continues to hire employees, the employees hired do not match the projections in the business plan. The petitioner has provided no explanation for the changes in anticipated employment; specifically, the elimination of a designer position, an accounting position, and a sales position (filled by the general manager instead of a new hire). Nor has the petitioner explained the current projections of a fabrication manager and two staff members not originally projected. While the petitioner provides a new chart listing current and future employees, he does not provide a new business plan to explain the changes from the chart submitted initially.

Further, the original business plan lacks many of the elements discussed in Matter of Ho listed above. The plan refers to "our experience and relationship with suppliers," but does not list those suppliers or refer to any negotiations with suppliers. Further, no market strategy is provided. Finally, while not conclusive on its own, it is significant that the lease only provides for five unreserved and no reserved parking spaces. As such, it is not clear that the business space rented is sufficient for 10 employees.

In light of the above, it is not reasonable that the petitioner will create 10 full-time continuous jobs for qualifying employees.

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.